

Shak Yong @ Hew Chong & Ors v Hew Sak Yong

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-802
OF 2010

MOHD HISHAMUDIN, ZAHARAH IBRAHIM AND AZAHAR
MOHAMED JJCA

29 MARCH 2013

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*Civil Procedure — Appeal — Appellate intervention — Reluctance to disturb
finding of fact — Whether trial judge misdirected himself in assessing whole of
evidence — Whether lack of judicial appreciation — Whether serious error on a
very crucial point directly relevant to defence — Whether appellate intervention
warranted*

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*Civil Procedure — Pleadings — Material facts — Non est factum not pleaded —
Whether may be raised during trial — Whether plaintiff prevented from relying on
non est factum*

E

*Land Law — Transfer — Fraud — Misrepresentation — Burden of proof —
Whether transfer document fraudulently misrepresented as loan documents —
Whether fraud proven*

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*Tort — Fraud — Misrepresentation — Proof, of — Allegation that transfer of
property obtained through fraudulent misrepresentation — Burden of proof —
Whether transfer document fraudulently misrepresented as loan documents —
Whether fraud proven*

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The plaintiff/respondent and his elder brother, the first defendant/first appellant, were the registered co-owners of a three storey building ('the property'). The second defendant was the wife of the first defendant. The third defendant was the first defendant's daughter. One Seek Hai Loon ('the deceased') was the fiance of the third defendant. According to the plaintiff, on 20 December 1990, first, second and third defendants represented to him that the third defendant and the deceased were in urgent need of money and wanted to obtain a bank loan by using the property as collateral. The first, second and third defendants then produced some documents which the plaintiff claimed he signed believing to be loan documents. However, in 2001, the plaintiff discovered that the purported loan documents were actually a memorandum of transfer and a deed of gift which transferred the entire property to the deceased for consideration of love and affection (the first transfer). Prior to his death on

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- A 31 May 2000, the deceased had transferred the property to the first, second and third defendants, also for consideration of love and affection (the second transfer). The fourth defendant was an advocate and solicitor who handled the first transfer. The plaintiff thus filed this action claiming declarations that the first and second transfers be declared unlawful, void and of no legal effect and
- B that the plaintiff's status as the registered co-owner be restored. The plaintiff contended that the transfers were procured by fraud. The first, second and third defendants on the other hand claimed that the plaintiff had willingly transferred the property to the deceased since the plaintiff and first defendant faced difficulties in servicing their loan. They claimed that due to the deceased's
- C ill health, the property was subsequently transferred to themselves. The High Court allowed the plaintiff's claim and hence this appeal.

Held, allowing the appeal with costs of RM10,000:

- D (1) In respect of an appeal which turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by the trial judge for the reason that as trier of fact the trial judge has audio-visual advantage. Nonetheless, it would be opened to the appellate court to interfere with the finding made by a trial judge if such a finding is not
- E supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself (see para 10).
- F (2) The person who asserts the existence of any fact must prove the facts exist. The burden was therefore on the plaintiff to prove that the alleged fraudulent misrepresentation was made by the first, second and third defendants and that the plaintiff relied on such fraudulent misrepresentation (see para 11).
- G (3) The plaintiff's allegation that an act of fraud had been committed and/or that first, second and third defendants fraudulently misrepresented the purpose of the documents to him was not supported by a shred of evidence. The plaintiff failed to prove the alleged fraud and/or fraudulent misrepresentation (see para 13).
- H (4) It is trite law that parties are bound by their pleadings. The plaintiff did not plead non est factum as one of the ground upon which he would be relying upon. Therefore, the plaintiff should not be allowed to rely on this ground (see para 14).
- I (5) The learned judicial commissioner ('JC') had misdirected himself in assessing the whole of the evidence presented before him. Had the JC considered the evidence of the fourth defendant in its proper perspective and weighed his testimony against the evidence of the plaintiff, it was highly unlikely that he would have accepted what was said by the plaintiff

in evidence as the truth. This indicated a lack of judicial appreciation on the part of the JC resulting in the first, second and third defendants being prejudiced. This was a serious error on a very crucial point directly relevant to the defence of the first, second and third defendants warranting appellate intervention (see paras 17–18).

[Bahasa Malaysia summary]

Plaintif/responden dan abangnya, defendan pertama/perayu pertama, merupakan pemilik bersama berdaftar sebuah bangunan tiga tingkat ('hartanah tersebut'). Defendan kedua adalah isteri kepada defendan pertama. Defendan ketiga merupakan anak perempuan defendan pertama. Seorang yang bernama Seek Hai Loon ('si mati') adalah tunang defendan ketiga. Menurut plaintif, pada 20 Disember 1990, defendan pertama, kedua dan ketiga memaklumkan kepadanya bahawa defendan ketiga dan si mati memerlukan wang dan ingin mendapatkan pinjaman bank menggunakan hartanah tersebut sebagai kolateral. Defendan pertama, kedua dan ketiga kemudiannya mengemukakan beberapa dokumen yang mana didakwa oleh plaintif ditandatangani kerana dia mempercayai kesemuanya merupakan dokumen-dokumen pinjaman. Walau bagaimanapun, pada tahun 2001, plaintif mendapati bahawa dokumen-dokumen pinjaman tersebut sebenarnya merupakan memorandum pindah milik dan surat ikatan pemberian yang memindah milik kesemua hartanah tersebut kepada si mati sebagai balasan cinta dan kasih sayang ('pindah milik pertama'). Sebelum kematiannya pada 31 Mei 2000, si mati telah memindah milik hartanah tersebut kepada defendan pertama, kedua dan ketiga, juga sebagai balasan cinta dan kasih sayang ('pindah milik kedua'). Defendan keempat adalah peguambela dan peguamcara yang mengendalikan pindah milik pertama. Plaintif kemudian memfailkan tindakan ini menuntut pengisytiharan bahawa pindah milik pertama dan kedua diisytiharkan sebagai menyalahi undang-undang, terbatal dan tidak memberi kesan undang-undang dan bahawa status plaintif sebagai pemilik bersama berdaftar dikembalikan. Plaintif menghujahkan bahawa kedua-dua pindah milik diperolehi dengan cara penipuan. Defendan pertama, kedua dan ketiga, sebaliknya, mendakwa bahawa plaintif telah memindah milik hartanah tersebut kepada si mati secara sukarela kerana plaintif dan defendan pertama menghadapi kesukaran membayar balik pinjaman mereka. Mereka menghujahkan bahawa akibat keuzuran si mati, hartanah tersebut dipindah milik kepada mereka. Mahkamah Tinggi membenarkan tuntutan plaintif dan oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

- (1) Berkenaan rayuan yang membangkitkan persoalan fakta, mahkamah rayuan amnya enggan mengganggu dapatan fakta oleh hakim bicara kerana sebagai pembicara fakta, hakim bicara mempunyai kelebihan audio-visual. Walau bagaimanapun, adalah terbuka kepada mahkamah

- A rayuan untuk campur tangan dalam dapatan yang dibuat oleh hakim bicara sekiranya dapatan tersebut tidak disokong oleh keterangan atau keputusan tersebut bercanggah dengan berat keterangan atau tiada pertimbangan kehakiman yang betul atau terdapat salah arah undang-undang atau mahkamah bicara telah secara asasnya tersalah arah (lihat perenggan 10).
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- (2) Pihak yang mendakwa kewujudan apa-apa fakta mestilah membuktikan fakta tersebut wujud. Beban adalah dengan itu, atas plaintif untuk membuktikan bahawa dakwaan penipuan salah tersebut dibuat oleh defendan pertama, kedua dan ketiga dan bahawa plaintif bergantung pada penipuan salah tersebut (lihat perenggan 11).
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- (3) Dakwaan plaintif bahawa satu penipuan telah dilakukan dan/atau bahawa defendan pertama, kedua dan ketiga telah secara menipu memberi salah nyataan tujuan dokumen-dokumen tersebut kepadanya tidak disokong oleh sebarang keterangan. Plaintif gagal untuk membuktikan dakwaan penipuan dan/atau penipuan salah tersebut (lihat perenggan 13).
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- E (4) Adalah undang-undang matan bahawa pihak-pihak terikat dengan pliding mereka. Plaintif tidak memplidkan *non est factum* sebagai salah satu alasan yang akan disandarkannya. Oleh itu, plaintif tidak seharusnya dibenarkan bersandar pada alasan ini (lihat perenggan 14).
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- (5) Pesuruhjaya kehakiman ('PK') telah tersalah arah dirinya dalam mempertimbangkan kesemua keterangan yang dikemukakan kepada beliau. Sekiranya PK mempertimbangkan keterangan defendan keempat dalam perspektif yang betul dan menimbangkan keterangannya terhadap keterangan plaintif, adalah berkemungkinan bahawa dia akan menerima apa yang dinyatakan oleh plaintif dalam keterangannya, sebagai kebenaran. Ini menunjukkan tiada pertimbangan kehakiman di pihak PK yang mengakibatkan defendan pertama, kedua dan ketiga diprejudis. Ini adalah satu kekhilafan serius ke atas fakta penting yang relevan kepada pembelaan defendan pertama, kedua dan ketiga, mewajarkan campur tangan mahkamah rayuan (lihat perenggan 17–18).]
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Notes

I For cases on fraud, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5416–5419.

For cases on material facts, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6504–6506.

For cases on misrepresentation, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 872–876.

Cases referred to

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Legislation referred to

National Land Code s 340(1), Form 14A

Appeal from: Civil Suit No S6–22–958 of 2004 (High Court, Kuala Lumpur)

Preetha Pillai (Skrine & Co) for the first, second and third appellants.

Chan Tse Yuen (Chan Tse Yuen & Co) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This is an appeal by the first, second and third appellants (the first, second and third defendants in the High Court) against the whole of the decision of the learned judicial commissioner ('JC') of the High Court at Kuala Lumpur given on 25 February 2010 whereby the learned JC allowed the respondent's claim (the plaintiff in the High Court) against the said three appellants and dismissed the respondent's claim against the fourth defendant in the court below with costs.

[2] We heard the appeal, wherein at the conclusion of the hearing we unanimously allowed it with costs. We now give our reasons for so deciding. For convenience and ease of reference, we will refer to parties in this judgment as in the manner they were referred to in the court below.

[3] The plaintiff and his elder brother, the first defendant, were at all material time the registered co-owners of a three storey building held under Grant No 6769, Lot No 2048, Mukim Labu, in the District of Seremban, bearing postal address No 49 Jalan Besar, 71800 Nilai, Negeri Sembilan ('the property'). The second defendant is the wife of the first defendant. The third defendant is the daughter of the first and second defendants.

[4] It is the plaintiff's case that one Seek Hai Loon ('the deceased') was the fiance of the third defendant. According to the plaintiff, on or about 20 December 1990, the first, second and third defendants represented to him that the third defendant and the deceased were in urgent need of money to start a new business, and pleaded with him to help raise money by using the property as collateral to obtain a loan from the Overseas Chinese Bank ('OCBC'). The first, second and third defendants then produced some documents and requested the plaintiff to sign, telling him that those were loan documents.

- A [5] It is the plaintiff's case that he signed the purported loan documents in December 1990 in the belief that they were loan documents required by OCBC. According to the plaintiff, sometime in 2001, he discovered that the purported loan documents which he was asked to sign in December 1990 turned out to be a memorandum of transfer, ie Form 14A of the National Land Code dated 20 December 1990 (exh P9) and a deed of gift dated 15 December 1990 which transferred the entire property to the deceased for consideration of love and affection (the first transfer). As it turned out, prior to his death on 31 May 2000, the deceased transferred the property to the first, second and third defendants, also for consideration of love and affection (the second transfer). It is pertinent to note that the fourth defendant is an advocate and solicitor who was at all material times a legal assistant of Messrs Halim Ismail & Co in charge of the matter in relation to the first transfer of the property from the plaintiff and the first defendant to the deceased vide Registration No 4617/91, *Jilid* No 1404, Folio No 64.
- D [6] Subsequently, the plaintiff filed an action herein against all the four defendants, praying, inter alia, for:
- (a) a declaration that:
- E (i) the first transfer be declared unlawful, void and of no legal effect;
- (ii) the second transfer be declared unlawful, void and of no legal effect;
- (iii) the first transfer be declared void ab initio and that all the plaintiffs one half (1/2) undivided share in the property shall remained intact and shall not be affected by the first transfer or the second transfer;
- F and
- (iv) the plaintiff's status as the registered co-owner shall be restored, reinstated and maintained;
- G (b) for orders that the registrar of land titles shall:
- (i) cancel and expunge the entries and memorials in the register of land titles with regard to the first transfer and the second transfer within 14 days from the date of the orders of this court; and
- H (ii) restore and/or reinstate the plaintiff's name as the registered co-owner of the property within 14 days from date of the order of this court;
- I (c) general damages to be awarded against the first, second, and third defendants and the fourth defendant to be assessed and to be awarded to the plaintiff as court may deem just or proper; and
- (d) exemplary damages against the first, second, and third defendants and the fourth defendant to be assessed and to be awarded to the plaintiff as court may deem just or proper.

[7] The plaintiff's claims are based on the grounds that the first transfer was procured by fraud and the second transfer was subsequently procured by fraud actuated by dishonesty and bad faith with the purpose to eliminate the plaintiff's name from the register of the property thereby denied all rights, title and interests of the plaintiff in the property as the rightful registered co-owner in law and/or equity.

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[8] The first, second, and third defendants categorically denied the contention of the plaintiff. It is their case that on 3 February 1978 and subsequently on 6 February 1998 both the plaintiff and the first defendant charged the property to OCBC in order to secure a loan facility. The loan was used for extension works in respect of a property where a shop by the name 'Coffee Shop Chong Kong' was operating. The repayment of the loan was paid solely by the first defendant. The plaintiff ran his chicken rice business on the ground floor of the property, where the second defendant also ran the business of selling noodles. The plaintiff also occupied the second and 3rd floors of the property with the first, second and third defendants. However, the utility bills of the property have always been paid by the first defendant. In 1990, the first defendant faced difficulties in servicing the loan. He proposed to the plaintiff that the property be transferred to the deceased who was at that time engaged to the third defendant on the condition that the deceased would obtain a bank loan to repay the OCBC loan. The plaintiff agreed to the proposal. Subsequent to the plaintiff's agreement to the proposal, the property was transferred to the deceased by a deed of gift dated 15 December 1990 which states that the consideration for the transfer was for love and affection. The transfer was formally carried out through P9 dated 20 December 1990. Due to the deceased's ill health, the property was then transferred to the first, second, and third defendants and this second transfer was duly registered on 3 March 2000. Subsequently, the plaintiff was informed by the first defendant that the second defendant intended to discontinue her business and therefore the first, second, and third defendants intended to sell the property. The plaintiff then started enquiring regarding his ownership of the property and subsequently started negotiating the sale of the property. The plaintiff proposed to pay the first, second, and third defendants a sum of RM300,000 and in return they would have to vacate the property. The only other option given by the plaintiff is for them to pay RM300,000 to him and in return they would vacate the property. The first, second, and third defendants were not agreeable to the plaintiff's proposal. Subsequently, the plaintiff filed the action herein against all the four defendants.

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[9] After a full trial, as we have indicated earlier, the learned JC allowed the plaintiff's claim against the first, second, and third defendants and dismissed the plaintiff's claim against the fourth defendant with costs.

- A [10] To begin with, we are mindful of the principle of law that in respect of an appeal which turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by the trial judge for the reason that as trier of fact the trial judge has audio-visual advantage which we do not have. Nonetheless, it would be opened to us to interfere with the finding made by a
- B trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself.
- C [11] In the present case, in our view, the first and second transfer were duly executed and registered according to the requirements of the National Land Code ('the NLC'). The established principle of law is that the registered owner of a property has immediate indefeasible title to the property concerned under
- D s 340(1) of the NLC. The person who asserts the existence of any fact must prove the facts exist. The burden is therefore on the plaintiff to prove that the alleged fraudulent misrepresentation was made by the first, second, and third defendants and that the plaintiff relied on such fraudulent misrepresentation.
- E [12] In our judgment, there is merit in the arguments of learned counsel for the first, second, and third defendants that the learned JC misdirected himself on law and facts. With respect, there are in essence two serious errors and misdirection that the learned JC fell in, which in our view, had rendered his decision liable to be set aside. We shall deal each of them in turn.
- F [13] The first error is this. As indicated earlier, the plaintiff must prove the alleged fraud and/or fraudulent misrepresentation. In his testimony, the plaintiff merely asserted that when he signed the deed of gift and P9 in relation to the first transfer he was told that it was to enable the deceased to obtain a loan
- G for an alleged new business. However, the plaintiff did not adduce any evidence to support this allegation. Not a single witness could corroborate the plaintiff's allegation that the first, second, and third defendants represented to him that the third defendant and deceased were in urgent need of money to start a new business, and therefore pleaded with him to help raise money by using the
- H property as collateral to obtain a loan from the OCBC. In our judgment, the plaintiff's allegation that an act of fraud had been committed and/or that the first, second, and third defendants fraudulently misrepresented the purpose of P9 to him is not supported by a shred of evidence. The learned JC only relied on the mere assertions made by the plaintiff in his attempt to prove his case.
- I Nowhere in his judgment did the learned trial judge direct his mind to the unreliability of the plaintiff's evidence. For instance, the plaintiff alleged that he could not understand English and therefore was deceived into signing P9. However, when pointed out that the plaintiff's own police reports (exhs P1, P2 and P3) were made in the English Language, the plaintiff attempted to deny his

proficiency in that language by asserting that the reports were read back to him in *Bahasa Malaysia* before he signed it. When asked to describe his proficiency in *Bahasa Malaysia* the plaintiff admitted that he is not very fluent in it. The plaintiff's contention that he could not understand English could not be sustained. The plaintiff received education up to the first year of secondary school where English was the medium of instruction. The plaintiff also testified that in 1986 he read and understood a bank statement that was written in English. We agree with the submissions of learned counsel for the first, second and third defendants that for the plaintiff to now assert that he signed P9 as a result of fraud and/or fraudulent misrepresentation and that he never understood the nature and effect of signing P9 is wholly inconsistent with the evidence which had been adduced. In our judgment, the plaintiff had failed to prove the alleged fraud and/or fraudulent misrepresentation.

[14] In any case, it is trite law that parties are bound by their pleadings (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490). The plaintiff did not plead non est factum as one of the ground upon which he will be relying upon. Therefore, the plaintiff should not be allowed to rely on this ground.

[15] We have closely scrutinised the judgment of the learned JC. In our view, with respect, there was insufficient judicial appreciation of the evidence of the plaintiff. The learned JC accepted at face value every word that was said by the plaintiff as the truth. On what constitutes judicial appreciation of evidence, it is apt to bear in mind the following words of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[16] Coming back to the present case, the learned JC's finding of the plaintiff as a witness of truth was for that reason questionable. This goes against the duty of a trial judge which is required to test the evidence of a particular witness against the probabilities of the case.

- A** [17] This brings us to the second error. The learned JC had misdirected himself in assessing the whole of the evidence presented before him. It is his duty to consider the entire evidence including the evidence which favours the first, second, and third defendants. During the trial, the first defendant testified that P9 was signed in the presence of the fourth defendant, an advocate and solicitor. In this regard, the material part of the evidence of the fourth defendant is as follows:

Q: Mr. Poh, where did the execution of the Deed of Gift and the MOT (hereinafter referred to as 'the Documents') of the said Property take place?

- C** **A:** The Documents were prepared by me and typed by my then secretary one, Cheong Sook Hiang (f) basing on the details provided by the SHL. Upon completion of the Documents, the SHL drove me to Nilai Old Town in or around mid December 1990 to meet up with plaintiff and the 1st defendant. I was informed that the plaintiff and first defendant being coffee shop operators would prefer to execute the Documents at their convenience i.e. at their shop premise in the Nilai. At about noon on that day I met the plaintiff, plaintiff's wife, 1st and 2nd defendants at Nilai.

D **Q:** So, what transpired during your meetings with the plaintiff, plaintiffs wife, 1st and 2nd defendant and the late SHL?

- E** **A:** I introduced myself as advocate & solicitor representing them in the transfer exercise involving the Deed of Gift and the MOT with regard to the said property.

F **Q:** Did you explain in details in Cantonese the contents and full implication of the Deed of Gift and MOT of the said Property to the parties in the coffee shop which include the plaintiff, plaintiffs wife, the 1st defendant, 2nd defendant and the late SHL?

- G** **A:** I verily believe that the parties including the plaintiff and the 1st defendant understood the nature and implication of the said transaction contained in the Deed of Gift and MOT. I further stress to them that their existing loan taken by the plaintiff and the defendant from OCBC Bank will be absorbed by the SHL where he will undertake to redeem the same by taking a further loan under his name.

Q: After explaining to the parties, what do you do?

- H** **A:** After explaining to the parties, I was given a copy of the Title Deed of the said Property by the 1st defendant and thereupon witnessed the execution of the Deed of Gift and MOT by plaintiff, 1st defendant and the late SHL in the presence of the entire group.

- I** [18] From the evidence, it cannot be disputed that the fourth defendant had explained to the plaintiff the true nature of P9 and the effect of the plaintiff and the first defendant signing it. The fourth defendant further confirmed that the plaintiff understood what had been explained to him. It is relevant to note that the learned JC dismissed the plaintiff's claim against the fourth defendant. This

demonstrates that the learned JC accepted the evidence of the fourth defendant. Moreover, the second and third defendants testified that although they were not at the table where the fourth defendant was explaining the nature of the documents to the plaintiff and the first defendant, they were within the immediate vicinity of the place where P9 was being signed. According to the irrefutable evidence of the second and third defendants, during that occasion the plaintiff did not show any sign of protest and there were no argument between the parties present that would suggest that the plaintiff disagreed with the execution of P9. In our judgment, the learned JC had failed to view the evidence of the fourth defendant objectively. With respect, the learned JC ought to have considered the evidence of the fourth defendant in its proper perspective and weighed his testimony against the evidence of the plaintiff. Had the learned JC done that, it is highly unlikely that he would have accepted what was said by the plaintiff in evidence as the truth. This indicates a lack of judicial appreciation on the part of the learned JC resulting in the first, second, and third defendants being prejudiced. In our judgment, this is a serious error on a very crucial point directly relevant to the defence of the first, second, and third defendants warranting appellate intervention.

[19] It is for all these reasons that we had allowed this appeal with costs of RM10,000 in favour of the first, second, and third defendants. The deposit was to be refunded to them. We had accordingly set aside the order of the learned JC.

Appeal allowed with costs of RM10,000.

Reported by Kanesh Sundrum

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